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FILED ORIGINAL

07 APR 18 AM 11:00

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIABY: *pol*

DEPUTY

10  
11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13 DIANE SWARBERG, individually and on  
14 behalf of all others similarly situated,

Plaintiffs,

v.

15 MENU FOODS HOLDING, INC.,  
16 THE IAMS COMPANY, and  
17 DOES 1 through 100, inclusive,

Defendants.

'07 CV 0706BTM POR

CASE NO.

NOTICE OF REMOVAL OF ACTION;  
DEMAND FOR JURY TRIAL

[28 U.S.C. § 1441(a)]

## TO THE CLERK OF THE ABOVE-ENTITLED COURT:

18  
19 PLEASE TAKE NOTICE that defendant, MENU FOODS HOLDING, INC. (hereinafter  
20 referred to as "MENU FOODS" or "Defendant"), pursuant to 28 U.S.C. sections 1441 and 1446,  
21 files this Notice of Removal (hereinafter "Notice") of this action from the Superior Court of the  
22 State of California for the County of San Diego to the United States District Court for the  
23 Southern District of California. The grounds for removal are as follows:

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**I. INTRODUCTION**

1. DIANE SWARBERG, on behalf of herself, similarly situated consumers, and the general public (hereinafter referred to as "Plaintiff"), commenced this products liability action in the Superior Court of the State of California, County of San Diego, entitled DIANE SWARBERG v. MENU FOODS HOLDING, INC., THE IAMS COMPANY, and DOES 1 THROUGH 100, Case No. 37-2007-00064066-CU-MY-CTI, on March 26, 2007. Plaintiff alleges that her pet became ill upon consuming pet food manufactured and distributed by Defendant. Plaintiff further claims that she sustained compensatory damages, including veterinarian bills and related expenses, as a result of her pet's illness. A true and correct copy of the Complaint is attached hereto and incorporated by reference as **Exhibit A**.

2. MENU FOODS has yet to be served with a copy of the Summons and the Complaint; however, it makes this Notice having received notice of this action. Pursuant to 28 U.S.C. section 1441, this Notice of Removal is timely filed.

3. As more fully set forth below, this is a civil action over which this Court has original jurisdiction under 28 U.S.C. section 1332(d)(2), and this action is removable under 28 U.S.C. section 1441, because it is a civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action between citizens of different states. Therefore, pursuant to 28 U.S.C. section 1441(a), the Defendant may remove this action to this Court.

**II. THIS COURT HAS SUBJECT MATTER JURISDICTION**

**A. The Amount in Controversy Requirement Exceeds \$5,000,000**

4. It is apparent from the fact of the Complaint that the Plaintiff seeks recovery of an amount in excess of \$5,000,000, exclusive of costs and interest. Plaintiff filed this class action on behalf of herself as an individual and similarly situated individuals of the United States whose pets became ill and/or died after consuming various brands of allegedly tainted pet food for dogs and cats manufactured by Defendant and distributed and sold through the State of California and the country. Plaintiff alleges that she has sustained compensatory damages in the form of veterinarian bills and related expenses, as a result of her pet's illness. In addition, Plaintiff alleges

1 that countless pets have died, and thousands of pets throughout the State of California have  
2 suffered serious adverse health consequences, and have required extensive medical care, as a  
3 result of consuming the affected pet food. Plaintiff acknowledges that the members of the  
4 putative class are numerous, and although the entire class is unknown to Plaintiff at this time, it is  
5 estimated that the entire class is "at least in the hundreds, if not thousands considering the fact  
6 that Menu Foods Holding, Inc. has identified 53 dog foods and 42 cat foods which may be  
7 causing harm to pets . . ." Plaintiff's prayer for relief seeks special damages, including veterinary  
8 expenses and loss of earnings; disgorgement of all profits, punitive damages; and attorney fees,  
9 on behalf of herself and all the members of the class. Further, nowhere in the Complaint does the  
10 Plaintiff limit the amount in controversy to less than \$5,000,000. See **Exhibit A**.

11 5. "Where the class action complaint does not specify the amount of damages sought,  
12 the removing defendant must prove by a preponderance of the evidence that the amount in  
13 controversy requirement has been met." Davis v. Chase Bank U.S.A., 453 F.Supp.2d 1205, 1208  
14 (C.D. Cal. 2006). Under this standard, "the defendant must provide evidence that is 'more likely  
15 than not' that the amount in controversy satisfies the federal diversity jurisdictional amount  
16 requirement." Davis, 453 F.Supp.2d at 1208; citing Abrego v. The Down Chemical Co., 443 F.3d  
17 676, 683 (9<sup>th</sup> Cir. 2006).

18 6. Based on Plaintiff's own allegations that MENU FOODS has issued a recall of 53  
19 brands of "cuts and gravy wet-style dog food" and 42 brands of "cuts and gravy wet style cat  
20 food," and the types of damages claimed in the Complaint, it is apparent that the amount in  
21 controversy exceeds \$5,000,000, exclusive of costs and interest.

22 7. Moreover, there are numerous pending class actions against MENU FOODS in  
23 various federal judicial districts in which the named plaintiffs allege that jurisdiction exists under  
24 28 U.S.C. section 1332(d)(2). There is on reason to believe that the damages or amount in  
25 controversy, exclusive of costs and interest, claimed by the Plaintiff in this civil action will be  
26 less than those alleged in the pending federal cases.

27 8. The Defendant has, therefore, met its burden of showing a reasonable probability  
28 that the amount in controversy satisfies the federal jurisdictional amount.

**B. Complete Diversity of Citizenship Exists**

9. There is complete diversity of citizenship between the Plaintiff and the Defendants in this action. Diversity in a class action is established when "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. section 1332(d)(2)(A).

10. According to the Complaint, the named Plaintiff is a citizen of the State of California.

11. MENU FOODS is a Delaware corporation with its principal place of business in Streetsville, Ontario, Canada. Pursuant to 28 U.S.C. section 1332(c)(1), "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. section 1332(c)(1). MENU FOODS is deemed to be a citizen of the state listed above, which is not the State of California.

12. The other named defendant, THE IAMS COMPANY, is, on information and belief, an Ohio company. THE IAMS COMPANY has not appeared in the action. The "DOE" defendants are wholly fictitious and sham parties against whom no relief is, or could be, sought in this action. Pursuant to 28 U.S.C. section 1441(a), this Court should disregard the citizenship of any defendant sued under this fictitious name. Accordingly, it is not necessary that any parties join in this Notice of Removal of Action.

13. This case should be removed to the United States District Court for the Southern District of California pursuant to 28 U.S.C. sections 1332 and 1441, because: (1) the Plaintiff is a citizen of the State of California; (2) MENU FOODS is not a citizen of the State of California; and (3) the amount in controversy exceeds \$5,000,000, exclusive of costs and interest.

**III. PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED**

14. This Notice of Removal is timely according to 28 U.S.C. section 1446(b).

15. The Defendant, in good faith, believes that the amount in controversy exceeds \$5,000,000, exclusive of costs and interest, and complete diversity of citizenship exists.

16. The United States District Court of the Southern District of California embraces the county in which the state court action is now pending. Therefore, this action is properly removed to the Southern District of California pursuant to 28 U.S.C. section 93(a)(1).

17. Pursuant to 28 U.S.C. section 1446(d), the Defendant is filing written notice of this removal to all adverse parties and will file a copy of the notice with the clerk of the State court in which this action is currently pending.

**WHEREFORE**, MENU FOODS respectfully moves this action from the Superior Court of the State of California for the County of San Diego to the United States District Court for the Southern District of California pursuant to 28 U.S.C. sections 1332, 1441, and 1446.

**DEMAND FOR JURY TRIAL**

Pursuant to Federal Rule of Civil Procedure 38, MENU FOODS hereby demands trial by jury in this action.

DATED: 18 APR 07

HIGGS, FLETCHER & MACK LLP

By: 

SUSAN M. HACK, ESQ.  
Attorneys for Defendant MENU FOODS  
HOLDING, INC.



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CENTRAL DIVISION

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9 Diane Swarberg

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SAN DIEGO

12 DIANE SWARBERG, individually and on  
13 behalf of all others similarly situated

No. 37-2007-00064066-CU-MT-CTL

14 Plaintiff,

15 vs.

16 MENU FOODS HOLDING, INC., THE  
17 IAMS COMPANY, and DOES 1 through 100,  
18 inclusive

19 **CLASS ACTION COMPLAINT**  
20 **FOR BREACH OF WARRANTY;**  
21 **VIOLATION OF THE CONSUMER**  
22 **LEGAL REMEDIES ACT CIVIL CODE §**  
23 **1750 ET SEQ.; NEGLIGENT**  
24 **MISREPRESENTATION; STRICT**  
25 **PRODUCTS LIABILITY; AND**  
26 **NEGLIGENCE**

27 Defendants

28 **BY FAX**

Plaintiff Diane Swarberg ("Plaintiff" or "Ms. Swarberg") brings this civil action for damages on behalf of herself and all other similarly situated against the above-named Defendants and complains and alleges as follows:

**I. NATURE OF ACTION**

1. Ms. Swarberg brings this action as a Class Action pursuant to Rule 382 of the Code of Civil Procedure, on behalf of all persons residing in the State of California who purchased any dog or cat food which was produced by any of the above-named defendants and has had a dog or cat become ill or died as a result of eating the food, and/or which have had to incur veterinary bills purchase special kidney sensitive food, both present and in the future, as a result of such injuries.

2 The defendants are producers and distributors of, *inter alia*, dog and cat food.

**CLASS ACTION COMPLAINT**

-1-

1 Menu Foods Holdings, Inc. produces dog and cat food under familiar brand names such as Iams,  
2 Eukanuba and Science Diet. Menu Foods Holdings, Inc. distributes its dog and cat food  
3 throughout the United States to retailers such as Wal-Mart, Target, Petco, PetSmart, and Safeway.

4           3. Dog and cat food which the defendants produced has caused an unknown number  
5 of dogs and cats to become ill, and caused several to die.

6           4       To date, Menu Foods Holdings, Inc. has recalled 53 brands of dog food and 42  
7 brands of cat food which are causing dogs and cats to become ill. All recalled food to date is of  
8 the "cuts and gravy wet" style. The recalled brands, including any to be added to the recall list  
9 later, are collectively referred to herein as the "Product."

10           5       As a result of the Defendants' actions Ms. Swarberg and other Class members have  
11 suffered and will suffer economic damage.

12 II. PARTIES

13           6.       Plaintiff Diane Swarberg has at all material times been a resident of San Diego,  
14 California.

15 7. Defendant Menu Foods Holdings, Inc. is, upon information and belief, a  
16 corporation organized under the laws of Delaware which transacts business in each of the 50  
17 United States, including the State of California and County of San Diego. Menu Foods Holdings,  
18 Inc. and/or its subsidiaries, is engaged in the business of manufacturing, distributing, marketing  
19 and selling pet foods.

20 8. Defendant, The Iams Company, is upon information and belief, an Ohio company  
21 which transacts business in California and all 50 States, including the State of California and  
22 County of San Diego. IAMS is engaged in the business of manufacturing, distributing, marketing  
23 and selling pet foods.

24 9. Plaintiff is ignorant at this time of the true names and capacities of Defendants  
25 identified in the caption of this Complaint as DOE 1 through DOE 25. Plaintiff is suing these  
26 Defendants by such fictitious names pursuant to California Code of Civil Procedure section 474  
27 and will amend this Complaint to show their true names and capacities when the same have been  
28 ascertained. For the time being, Plaintiff is informed and believes that Defendants DOES 1



1 though 25 were and are business entities, organizations, joint venturers, partnerships, associations,  
2 public entities, public agencies, and/or individuals who participated in the design, engineering,  
3 development, manufacture, marketing, and selling of the Product along with the other named  
4 Defendants.

5 10. Plaintiff is further informed and believe that, at all times mentioned in this  
6 Complaint, Defendants, including DOES 1 through 25, were the agent, servant, and/or employee  
7 of the other, and each was acting within the course and scope of their agency and/or employment  
8 with respect to the acts complained of in this Complaint.

### 9 10 III. JURISDICTION AND VENUE

11 11. This Court has jurisdiction over this action pursuant to California Code of  
12 Procedure section 410.10. Plaintiff seeks damages and restitution on behalf of herself and all  
13 others similarly situated in the United States, under common and statutory law of the State of  
14 California.

15 12. Venue is proper in this Court because (a) the warranties which are the subject of  
16 this action were made, or to be performed, and/or breached in this county; (b) the obligation or  
17 liability which is the subject of this action arose in this county; (c) some of the described injuries  
18 to property occurred in this county; (d) a substantial portion of the acts and transactions described  
19 herein occurred within this county; (f) Defendants are registered to do business in the State of  
20 California and/or are doing business within this county; and (g) because Defendants did do  
21 business in this county by selling and marketing the items at issue in this county. Attached to this  
22 Complaint as **Exhibit "A"** is a declaration from Plaintiff Swarberg attesting to facts establishing  
23 proper venue in this county pursuant to Civil Code section 1780(c).

#### IV. CLASS ACTION ALLEGATIONS

13. Plaintiff brings this lawsuit as a class action on behalf of herself and all other persons similarly situated, pursuant to *Code of Civil Procedure* section 382, and to the extent applicable, the analogous provisions of Federal Rule of Civil Procedure 23. And, as detailed below, this class action satisfies the numerosity, ascertainability, typicality, adequacy, predominance, and superiority requirements of those statutes. Plaintiff brings this suit on behalf of herself and a Plaintiff Class (the "Class") composed of:

All persons residing in the State of California at the time that they purchased any dog or cat food which was produced by the defendants which became the subject of the recall of such food, and who have had a dog or cat which became ill resulting in death or injury, and/or required veterinary examinations, and/or will require increased veterinary examinations as a result of eating the food.

Plaintiff reserves the right to modify this class definition prior to moving for class certification.

14. This action has been brought and may be properly maintained as a class action pursuant to C.C. P. 382, Civil Code section 1781, and Rule 23 of the Federal Rules of Civil Procedure for the following reasons:

a. The Class is ascertainable and there is a well-defined community of interest among the members of the Class;

b. Membership in the Class is so numerous as to make it impractical to bring all Class members before the Court. The identity and exact number of Class members is unknown but is estimated to be at least in the hundreds, if not thousands considering the fact that Menu Foods Holdings, Inc. has identified 53 dog foods and 42 cat foods which may be causing harm to pets, and there are news reports of many ill or dying pets;

c. Plaintiff's claims are typical of those of other Class members, all of whom have suffered harm due to Defendants' uniform course of conduct;

d. Plaintiff is a member of the Class;

1 c. There are numerous and substantial questions of law and fact common to all  
2 of the members of the Class which control this litigation and predominate over any individual  
3 issues. The common issues include, but are not limited to, the following:

4 i. Did the defendants make representations regarding the safety of the  
5 dog and cat food they produced and sold?

6 ii. Were the defendants' representations regarding the safety of the dog  
7 and cat food they produced and sold?

8 iii. Did the defendants' dog and cat food cause Plaintiff's and other  
9 Class members' pets to become ill?

10 iv. Were Plaintiff and other Class members damaged?

11 f. These and other questions of law or fact which are common to the members  
12 of the Class predominate over any questions affecting only individual members of the Class;

13 g. Plaintiff will fairly and adequately protect the interest of the Class in that  
14 Plaintiff has no interests that are antagonistic to other members of the Class and has retained  
15 counsel competent in the prosecution of class actions to represent herself and the Class;

16 h. Without a class action, the Class will continue to suffer damage,  
17 Defendants' violations of the law or laws will continue without remedy, and Defendants will  
18 continue to enjoy the fruits and proceeds of their unlawful misconduct;

19 i. Given (i) the substantive complexity of this litigation; (ii) the size of  
20 individual Class members' claims; and (iii) the limited resources of the Class members, few, if  
21 any, Class members could afford to seek legal redress individually for the wrongs Defendants  
22 have committed against them;

23 j. This action will foster an orderly and expeditious administration of Class  
24 claims, economies of time, effort and expense, and uniformity of decision;

25 k. Inferences and presumptions of materiality and reliance are available to  
26 obtain class-wide determinations of those elements within the Class claims, as are accepted  
27 methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendants'  
28 common liability, the Court can efficiently determine the claims of the individual Class members;

1 I. This action presents no difficulty that would impede the Court's  
2 management of it as a class action, and a class action is the best (if not the only) available means  
3 by which members of the Class can seek legal redress for the harm caused them by Defendants.

4 m. In the absence of a class action, Defendants would be unjustly enriched  
5 because they would be able to retain the benefits and fruits of their wrongful conduct.

6 15. The Claims in this case are also properly certifiable under applicable law.

#### 8 V. STATEMENT OF FACTS

9 16 Plaintiff Diane Swarberg was the owner of a male cat named Oscar.

10 17. Ms. Swarberg acquired Oscar in 1995.

11 18 Oscar ate one to three bags daily of IAMS Select Adult Bites, which is one of the  
12 foods covered by Defendants' recall. He has been eating IAMS Select Adult Bites for many years.  
13 He had been generally healthy up until March 2007.

14 19 In March 2007, Oscar became extremely ill and Ms. Swarberg took him to a  
15 veterinarian who informed her that Oscar had suffered kidney failure, also known as acute renal  
16 failure. A few days later, on March 15, 2007, tests showed that Oscar was suffering from  
17 irreversible kidney failure, and the advice of the veterinarian was that the humane thing to do was  
18 to euthanize Oscar, which was done with great reluctance. Blood and urine tests were done, and  
19 an autopsy has confirmed that the kidney failure was consistent with poisoning. On information  
20 and belief, at least six other cats in San Diego County have died due to poisoning by Defendants'  
21 Product.

22 20. In March 2007, Menu Foods Holdings, Inc. recalled 53 brands of cuts and gravy  
23 wet-style dog food and 42 brands of cuts and gravy wet style cat food which had caused dogs and  
24 pets to become ill. One common symptom in the sick animals was kidney failure, also known as  
25 acute renal failure. On information and belief, the recalled foods are contaminated with a  
26 rodenticide which is a known poison harmful to cats and dogs.

27 21. On information and belief, the contaminated Product has caused the deaths or  
28 sickness of hundreds of cats and dogs nationwide, requiring veterinary care, repeated monitoring

1 by veterinarians, special medication, and permanent injuries. Those class members who have had  
2 their pets die, have lost the fair market and other peculiar value (Civil Code § 3355) of their pets.  
3 The peculiar value of the pets to their owners, is deemed to be the value of that property because  
4 Defendants had notice thereof and/or were willful wrongdoers pursuant to Civil Code section  
5 3355. The class members have had to throw out substantial quantities of unused pet food due to  
6 the recall. The owners of such injured pets, such as Ms. Swarberg, have also suffered severe  
7 emotional distress at having their pets die and /or become hospitalized as a result of ingesting the  
8 Product. Those emotional distress claims will be subject to individualized proof, post-disposition  
9 of common class claims, as shall be further articulated in a trial plan.

#### 10 FIRST CAUSE OF ACTION

#### 11 BREACH OF WARRANTY

12 22. Plaintiff realleges all prior allegations as though fully stated herein.

13 23. Plaintiff and Class members purchased pet food produced by the defendants based  
14 on the understanding that the food was safe for their pets to consume.

15 24. The pet food produced by the defendants was not safe for pets to consume and  
16 caused dogs and cats to become ill. The unsafe nature of the pet food constituted a breach of the  
17 implied warranty of merchantability.

18 25. Cat food and dog food produced by Menu Foods Holdings, Inc. are "goods" within  
19 the meaning of Uniform Commercial Code Article 2.

20 26. Defendants' conduct as described herein constitutes breach of an implied or express  
21 warranty of affirmation.

22 27. Defendants' conduct as described herein constitutes breach of an implied warranty  
23 of merchantability.

24 28. Defendants' conduct as described herein constitutes breach of an implied warranty  
25 of fitness for a particular purpose.

26 29. As a proximate result of the aforementioned wrongful conduct and breach, Ms.  
27 Swarberg and other class members have suffered damages in an amount to be proven at trial.  
28 Defendants had actual or constructive notice of such damages.

1 30. As a result of the breach, Plaintiff and Class members suffered damages which may  
2 fairly and reasonably be considered as arising naturally from the breach or may reasonably be  
3 supposed to have been in the contemplation of the parties, at the time they made warranties as to  
4 the Product, and as the probable result of the breach of such warranties.

5  
6 **SECOND CAUSE OF ACTION**

7 **UNJUST ENRICHMENT**

8 31. Plaintiff realleges all prior allegations as thought fully stated herein.

9 32. Defendants were and continue to be unjustly enriched at the expense of Ms.  
10 Swarberg and other Class members.

11 33. Defendants should be required to disgorge this unjust enrichment.

12 **THIRD CAUSE OF ACTION**

13 **CONSUMER LEGAL REMEDIES ACT**

14 **(Civil Code section 1750, et. seq.)**

15 34. Plaintiff realleges all prior allegations as thought fully stated herein.

16 35. Defendants' sale of tainted pet food constitutes an unlawful, deceptive and unfair  
17 business act within the meaning of the Consumer Legal Remedies Act, Civil Code section 1750.  
18 et. seq.

19 36. Defendants are "persons" as defined under Civil Code section 1761(c).

20 37. Defendants violated Civil Code sections 1770(a)(5) and (7) when they failed to  
21 disclose that Defendants' Product is inherently defective and dangerous and not fit for its intended  
22 purpose. Defendants' sale of hazardous pet food has the capacity to deceive a substantial portion  
23 of the public and to affect the public interest.

24 38. As a result of the above material omissions, Defendants have committed the  
25 following violations of section 1770:

26 a) Defendants have represented that their pet food has characteristics or  
27 benefits which it does not have (section 1770(a) (5));

28 b) Defendants have falsely represented that their pet food is of a particular  
standard, quality or grade (section 1770(a) (7)).

1 39. Defendants' deceptive practices, as alleged above, were specifically designed to,  
2 and did, induce Plaintiffs and members of the Class to purchase the Product. Defendants  
3 engaged in marketing efforts to reach the Class and persuade members to purchase the  
4 defective Product, leading to the injuries to their pets as well as other damages.

5 40. As a result of Defendants' unfair or deceptive acts or practices, Ms. Swarberg and  
6 other class members suffered injuries in an amount to be proven at trial.

7 41. Plaintiff and the Class are providing Defendants with the notice required by with by  
8 giving notice of their violation of the Consumers Legal Remedies Act by mail. Plaintiffs at this  
9 time request only injunctive relief, until the expiration of the 30 day period in which Defendants  
10 may respond to the notice. Such injunctive relief may include further notice of the recall to the  
11 public, and an expansion of the recall, among other things. Plaintiff and the Class will amend  
12 their Complaint to add claims for damages in the event that Defendants do not respond to the  
13 Notice in the specified time. As such, Plaintiffs have therefore complied with the 30-day notice  
14 period required by Civil Code section 1782(a).

#### 15 **FOURTH CAUSE OF ACTION**

#### 16 **NEGLIGENT MISREPRESENTATION**

17 41. Plaintiff realleges all prior allegations as though fully stated herein.

18 42. Defendants owed Ms. Swarberg and the Class members as a duty to exercise  
19 reasonable care in representing the safety of its dog and cat foods.

20 43. Defendants falsely represented that its dog and cat food was safe for consumption  
21 by dogs and cats.

22 44. In reality, Defendants' dog and cat food caused dogs and cats to become ill and, in  
23 some cases, to die.

24 45. Ms. Swarberg and class members reasonably relied on the information provided by  
25 Defendants regarding the safety of its dog and cat food.

26 46. As a proximate cause of Defendants' false representations Ms. Swarberg and other  
27 Class members suffered damages in an amount to be proven at trial.  
28



**FIFTH CAUSE OF ACTION  
STRICT PRODUCTS LIABILITY**

47. Plaintiff realleges all prior allegations as though fully stated herein.

48. The Product in all its forms is defective in that it was manufactured or packaged such that it came to contain poisons that are harmful to animals which consume it. Defendants, and each of them, knew that the Product would be purchased and used without inspection for defects by the purchaser or user. The Product was further defective due to inadequate testing.

49. The kinds of harm which befell Plaintiff, her pet, and the members of the Class and their pets, including in the form of veterinary expenses and emotional distress, were entirely foreseeable results of the defect in the Product.

50. Neither Plaintiff nor any member of the Class knew or had reason to know at the time of his/her purchase, or at any time prior to the injuries to their pets, that the Product was defective.

51. Plaintiff requests damages including punitive damages, and medical and related expenses for their pets, against all Defendants.

**SIXTH CAUSE OF ACTION  
NEGLIGENCE**

52. Plaintiff realleges all prior allegations as though fully stated herein.

53. Because Defendants were in the business of manufacturing, canning, marketing, distributing and selling food for consumption by pets and possibly by members of the general public who might intentionally or unknowingly consume it, Defendants each owed a duty of care to the general public and to Plaintiff and the Class members in particular, to use reasonable care to see that the Product sold by them was fit for animal as well as human consumption.

54. Defendants, and each of them, failed to use reasonable care in the manufacture, processing, preparation, and sale of the Product as described above, and as a proximate result of their negligence and carelessness, poison in the form of rodenticide or other contaminants harmful to animals and humans was present in the Product purchased by the Class members and consumed



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1 by their pets.

2 **VII. PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff and the Class members request that the Court enter an order of  
4 judgment against Defendants including the following:

5 A. Certification of the action as a class action pursuant to C.C.P. Rule 382 and Civil  
6 Code section 1781 with respect to the claims for damages, and appointment of Plaintiff as Class  
7 Representative and her counsel of record as Class Counsel;

8 B. Actual damages (including all general, special, incidental, and consequential  
9 damages), statutory damages (including treble damages), punitive damages (as allowed by the  
10 law(s) of the states having a legally sufficient connection with defendants and their acts or  
11 omissions) and such other relief as provided by the statutes cited herein;

12 C. Prejudgment and post-judgment interest on such monetary relief;

13 D. Equitable relief in the form of restitution and/or disgorgement of all unlawful or  
14 illegal profits received by Defendants as a result of the unfair, unlawful and/or deceptive conduct  
15 alleged herein;

16 E. Other appropriate injunctive relief including but not limited to additional notice of  
17 the recall to the public;

18 F. The costs of bringing this suit, including reasonable attorneys' fees; and

19 G. Such other relief as this Court may deem just, equitable and proper.

20  
21 Date: March 26, 2007

BERDING & WEIL LLP

22  
23 By 

Jeffrey B. Cregg, Esq.  
Steven R. Weinmann, Esq.  
Attorneys for Plaintiff

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CLERK SUPERIOR COURT  
SAN DIEGO COUNTY, CA

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5 Attorneys for Plaintiff  
6 Diane Swarberg

## SUPERIOR COURT OF THE STATE OF CALIFORNIA

## IN AND FOR THE COUNTY OF SAN DIEGO

7  
8  
9  
10 DIANE SWARBERG, individually and on  
behalf of all others similarly situated,

No. 37-2007-00064066-CU-MT-CTL

Plaintiff,

DECLARATION IN LIEU OF  
AFFIDAVIT

vs.

(Code of Civil Procedure § 2015.5)

13 MENU FOODS HOLDING, INC., THE  
14 IAMS COMPANY, and DOES 1 through 100,  
15 inclusive,

DECLARATION OF PLAINTIFF DIANE  
SWARBERG PURSUANT TO CIVIL  
CODE SECTION 1780(c)

Defendants

BY FAX

I, DIANE SWARBERG, declare:

19  
20 1. I am the named Plaintiff in the above-captioned lawsuit, and I submit this  
21 Declaration in support of Plaintiff's Complaint and in accordance with Civil Code section  
22 1780(c) to state facts showing that this action has been commenced in a county described in  
23 Code of Civil Procedure section 1780 as a proper place for the trial of this action.

24 2. I am a citizen and resident of San Diego County, State of California, and, if called  
25 as a witness, I would testify of my own personal knowledge as follows:

26 3. In the period from 2005 to March 2007, I purchased cat food sold under the  
27 brand name "IAMS Select Adult Bites" for my cat, Oscar, at a store in San Diego County,  
28 California.

Mar 26 07 03:58p

03/26/2007 14:03 FAX

No. 9699

P. 4  
P. 3

1 4. It is my understanding that the cat food I purchased was manufactured by Menu  
2 Foods, Inc. for IAMS, and that this particular item is part of a recall of contaminated pet food by  
3 Menu Foods, Inc.

4 5. My cat, Oscar, became ill after consuming the IAMS / Menu Foods food.

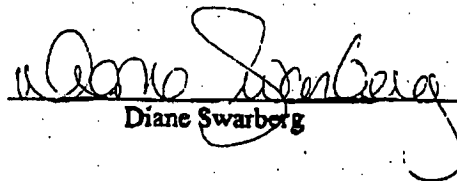
5 6. I brought him to a veterinarian, who told me that he was suffering from kidney  
6 failure.

7 7. Following further tests, it was decided that the most humane thing to do was to  
8 euthanize Oscar, who died on March 15, 2007.

9 8. An autopsy has been performed, and the tests show that Oscar had poison in his  
10 system. Recent press reports have stated that the Menu Foods products are contaminated with a  
11 type of rat poison.

12 9. All of the matters discussed herein occurred or substantially occurred in San  
13 Diego County, in the State of California.

14 I declare under penalty of perjury under the laws of the State of California that the  
15 foregoing is true and correct. Executed this 27 day of March, 2007, at San Diego  
16 California.

17  
18   
19 Diane Swarberg  
20  
21  
22  
23  
24  
25  
26  
27  
28

SUSAN M. HACK, ESQ. (Bar No. 145347)  
HIGGS, FLETCHER & MACK LLP  
401 West "A" Street, Suite 2600  
San Diego, CA 92101-7913  
TEL: 619.236.1551  
FAX: 619.696.1410

Attorneys for Defendant  
MENU FOODS HOLDING, INC.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

'07 CV 0706BTM POR

DIANE SWARBERG, individuall and on  
behalf of all others similarly situated,

Plaintiffs,

v.

MENO FOODS HOLDING, INC., THE  
JAMS COMPANY, and DOES 1 through  
100, inclusive,

Defendants.

CASE NO. \_\_\_\_\_

**PROOF OF SERVICE BY MAIL**

**TRIAL DATE: No Date Set**

I, the undersigned, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101. On April 18, 2007, I served the within documents:

1. **NOTICE OF REMOVAL OF ACTION; DEMAND FOR JURY TRIAL [28 U.S.C.§1441(A)]**

2. **DEFENDANT'S DEMAND FOR JURY TRIAL**

3. **LODGMET OF STATE COURT FILE**

on the interested parties in this action, by placing true copies thereof in a separate envelope addressed to each addressee, respectively, as follows:



By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission report issued by the transmitting facsimile machine is attached hereto.



(BY MAIL): I deposited such envelope in the mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing in affidavit. (CCP §§ 1013, 2015.5.)

**ATTORNEYS FOR PLAINTIFF  
DIANE SWARBERG**

**Jeffrey B. Cereghino, Esq.  
Steven R. Weinmann, Esq.  
BERDING & WEIL LLP  
3240 Stone Valley Road West  
Alamo, CA 94507**

**Tel: (925) 838-2090  
Fax: (925) 820-5592**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 18, 2007, at San Diego, California.

*Diana Zottolo*  
\_\_\_\_\_  
DIANA ZOTTOLO

JS 44  
(Rev. 07/89)**CIVIL COVER SHEET**

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

DIANE SWARBERG

**DEFENDANTS**

MENU FOODS HOLDING, INC., et al.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF SAN DIEGO  
(EXCEPT IN U.S. PLAINTIFF CASES)COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT POEL  
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE DESCRIPTION OF THE TRACT OF LAND INVOLVED.**(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)**

Jeffrey B. Cereghino, Esq. (99480)  
Steven R. Weinmann, Esq. (190956)  
BERDING & WEIL LLP  
3240 Stone Valley Road West  
Alamo, CA 94507

**ATTORNEYS (IF KNOWN)**

Susan M. Hack, Esq.  
HIGGS, FLETCHER & MACK LLP  
401 WEST A STREET, SUITE 2600  
SAN DIEGO, CA 92101

**II. BASIS OF JURISDICTION** (PLACE AN 'X' IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |   | PT                                    | DEF                        |   | PT                         | DEF                                   |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

**IV. CAUSE OF ACTION** (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)  
28 U.S.C. sections 1441 and 1446**V. NATURE OF SUIT** (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 161 Medicare Act <input type="checkbox"/> 162 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 163 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 180 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 360 Motor Vehicle <input type="checkbox"/> 365 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input checked="" type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (13958) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reappointment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 460 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 896 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motion to Vacate Sentence <b>HABEAS CORPUS:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions		

**VI. ORIGIN**

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 Original Proceeding  
☒ 2 Removal from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

**VII. REQUESTED IN COMPLAINT:** ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$CHECK YES only if demanded in complaint:  
JURY DEMAND: ☐ YES ☐ NO**VIII. RELATED CASE(S) IF ANY** (See instructions):

JUDGE

Docket Number

DATE

SIGNATURE OF A ATTORNEY OF RECORD

UNITED STATES  
DISTRICT COURT  
Southern District of California  
San Diego Division

# 137271 - A2  
April 18, 2007

Code	Case #	Qty	Amount
CV086900	3-07-CV-0706		60.00 CH
Judge	- MOSKOWITZ		
CV086400			100.00 CH
CV510000			190.00 CH

Total-> 350.00

FROM: CIVIL FILING  
SWARBERG V. MENU FOODS HOLDING  
INC ET AL.  
DCN 20125 SH